

(1981) 07 PAT CK 0012
In the Patna High Court
Case No : C.W.J.C. No. 3032 of 1980

Prof. Dr. Yogendra Singh (Retd. Colonel) APPELLANT
Vs
State of Bihar and Others RESPONDENT

Date of Decision : 29-07-1981

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226, 227

Citation : (1982) 30 BLJR 198 : (1982) PLJR 194

Hon'ble Judges : V. Mishra, J;S.K. Choudhury, J

Bench : Division Bench

Final Decision : Allowed

Judgement

V. Misra, J.—This is an application under Articles 226 and 227 of the Constitution of India for quashing annexures 5,6 and 8 to the petition. The petitioner is a Professor and Head of the Department of surgery, Magadh Medical College, Gaya which was originally a private medical college but has now been taken over by the State Government. Through annexure 5 the Special Secretary of the Health Department has intimated to the Principals of all the private medical colleges, since taken over by the State Government, that the services of all the directly appointed teachers who had attained the age of 62 or those who had crossed 58 but were below 62 be terminated on one month's notice. Through annexure 6 the Principal of the Magadh Medical College in his turn wrote to the petitioner on 12-9-80 that since he had crossed the age of 58 his services would automatically stand terminated at the end of the period of 30 days. Annexure 8 is an office order of the Principal, Magadh Medical College saying that the services of certain teachers named therein including the petitioner stood terminated with effect from 10-10-80 While praying to quash these three annexures (5,6 and 8) the petitioner has also prayed for permitting him to continue on his post by issuing a writ of mandamus on the respondents viz the State Government and University or College authorities. When the writ was admitted the operation of the aforesaid annexures were stayed.

2. The petitioner an ex-serviceman had retired while he was holding the rank of a colonel. On the recommendation of the Ministry of Defence, New Delhi his bio-data was called for by the Secretary of the Governing Body of the college in 1975 itself and ultimately he was appointed by the management a professor of surgery (vide the letter of appointment annexure 2). It was specifically mentioned in the appointment letter that his appointment was subject to regulations and as might be enforced from time to time by the Magadh University and adopted by the institution. At that time the Magadh Medical College was a private institution affiliated to the Magadh University. He actually joined on 27-12-75. These facts are not all disputed.

3. As it was felt by the State Government that the private medical colleges were being managed in a manner highly detrimental to the interest of the students and circumstances existed which rendered it necessary to take immediate action for taking over of the management of such colleges for a limited period in order to secure the proper management of the same, the Bihar Private Medical Colleges (Taking over of Management) Ordinance, 1976 (Bihar Ordinance No. 131 of 1976) was promulgated which empowered the State Government, to appoint through a notification, a body of persons (Board of Control) to take over the management of any private medical college and to exercise such functions of management of such college as would be specified in the notification (vide Section 3 of the Ordinance). It is under similar repromulgated Ordinance of 1978 that the Magadh Medical College was also taken over with effect from 1-7-78 (vide annexure 3).. Subsequently the above Ordinance culminated into the Bihar Private Medical Colleges (Taking over) Act, 1978 (Bihar Act 5 of 1978 (hereinafter referred to as the Act), and a fresh notification (annexure 3A) taking over the college was issued. It is thus this Act under which the Magadh Medical College now stands taken over by the State Government and the management and control thereof is sought to be exercised by the State Government. This is provided in Sub-section (1) of Section 3 of the Act. By virtue of Sub-section (2) all the assets stands transferred to the State Government. By virtue of Sub-section (3) all the liabilities and obligations of the college under any agreement or contract entered into bonafide before the date of the taking over devolves and would be deemed to have devolved on the State Government, Section 4 deals with effect of notification issued u/s 3 and Section 5 deals with the power of the State Government to vary or cancel certain contracts. There is no dispute in respect of these provisions,

3. The main dispute centres round the provision contained in Section 6 which provides that from the date of notification all the staff employed in the college cease to be the employees of the College body. A proviso thereto say that they (staff) would continue to serve the College on ad-hoc basis till a certain decision regarding them is taken by the State Government. It is on the strength of this provision (Section 6) that the State Government has issued the instruction contained in annexure 5. The logic behind issuing such instruction is that when the staff of the private medical colleges has ceased to be the employees of the

College body and when the college has been taken over by the State Government, all the members of the staff employed in the college become Government servants, and once they become Government servants they are governed by Bihar Service Code under which any employee has compulsorily to retire on attaining the age of 58. This position is refuted by the petitioner who contends that Section 6 of the Act does not authorise the State Government to vary the service conditions of the staff, particularly the petitioner, so as to effect his date of superannuation. According to the petitioner his date of superannuation would be the date when he would complete the age of 62 as fixed by the regulations and statutes which governed his college when he had joined. At the time of argument a plea that he has not been heard in the matter has also been taken. Thus annexures 5, 6 and 8 are challenged on the ground of their being illegal without jurisdiction and violative of principle of natural justice.

4. A counter-affidavit has been filed on behalf of the State the Special Secretary, Health Department and the Principal Magadh Medical College Gaya. The learned Attorney General of India who has argued on behalf of respondents 1 and 2 has also relied mainly on the provision of Section 6 read with Section 3(1) and 12 of the Act for the State Government to derive the authority to terminate the services of the petitioner on attaining the age of 58. According to him both Section 3(1) and Section 6 have to be read together and if that is done, the conclusion is irresistible that all employees including the petitioner have to retire on attaining the age of 58. It is said that the relationship between the petitioner and his private employer has come to an end, and so the age of superannuation (62 years) under the private employer cannot continue. Reliance has been placed on proviso to Section 6(1) also, which is said to have been followed in his case, inasmuch as the Screening Committee had also recommended for fixing 58 as the age of retirement. Further it is said that in absence of any specific rule fixing the age of superannuation of teachers of acquired colleges, the general rule would apply. The age of retirement in all medical colleges of the Government is 58, and so, fixing any other age of retirement for acquired medical colleges would be violative of Articles 14 and 16 of the Constitution. Reliance has been placed on Section 12 of the Act also to say that the provisions of the Act are paramount. Last but not the least, a plea has been taken that if the petitioner denies to be a Government servant, he cannot seek relief against the State Government.

5. In course of argument, it was conceded that-but for the provisions of the Act, the petitioner would retire on attaining the age of 62. In this view of the matter, it is not at all necessary to show by reference to different regulations and statutes that his age of superannuation under the conditions of service when he joined was 62. The petitioner has shown the same at pages 10 to 13 of the application. This was not refuted in course of argument.

6. I now proceed to discuss the relevant provisions of the Act for examining if the petitioner's age of retirement would be 58 or not.

In this connection I would first refer to Section 3 of the Act which runs as follows;

3. (1) The State Government may, by a notified order and from the date mentioned therein, take over a College and the management and control thereof shall thereupon be exercised by the State Government in such manner as may be laid down in the said order.

(2) All the assets and properties of the College and the College body whether movable or immovable including lands, buildings, workshops, stores, instruments, machinery, vehicles, cash balance, reserve fund, investment, taxes, furniture and others shall, on the date of take-over, stand transferred to and vested in, and be deemed to have come into the possession of the State Government.

(3) All the liabilities and obligations of the College under any agreement or contract entered into bona fide before the date of taking over shall devolve and shall be deemed to have devolved on the State Government.

Under Sub-section (1) the State Government has taken-over the college as per notification at Annexure 3-A. It only says that the State Government has taken-over some colleges named therein in which the name of Magadh Medical College, Gaya is also there. In paragraph 2 of the notification it has only been said that the management and control would be done in accordance with provisions contained in Section 4(a) of the Act. It has been seriously contended by Mr. Janardan Sinha, learned Counsel for the petitioner that under the first part of Section 3(1) the Government takes over the college and the consequence of taking over the college is given in the second part. The second part shows that only management and control of the college vests in the State Government and nothing more than that. It is for managing and controlling the affairs only that provisions have been made in Section 4 of the Act, with the details of which this writ application has nothing to do. The learned Attorney General on the other hand has contended that when the college has been taken over, it means that all the members of the staff become Government servants. It has however not been specifically laid down in the Act. Sub-sections (2) and (3) of Section 3 also detail out certain consequences of the taking over. Under Sub-section (2) it is the properties of the College which vest in the Government and under Sub-section (3) the liabilities and obligations devolve on the Government. Though the legislature took care to specifically make mention of properties, liabilities and obligations, absolutely nothing has been said, of course specifically, about the employees becoming the Government servants.

7. In this connection the most important provision to be considered is in Section 6 of the Act which runs as follows;

6. Determination of terms of the teaching staff and other employees of the College.-(I) As from the date of the notified order, all the staff employed in the College shall cease to be the employees of the College body:

Provided that they shall continue to serve the College on an ad hoc basis till a decision under Sub-sections (3) and (4) is taken by the State Government.

(2) The State Government will set up one or more Committees of experts and knowledgeable persons which will examine the bio-data of each member of the teaching staff and ascertain whether appointment, promotion or confirmation was made in accordance with the University Regulations and in keeping with the guidelines laid down by the Medical Council of India and take into consideration all other relevant materials including length of service in College, and submit its report to the State Government.

(3) The State Government on receipt of the report of the Committee or Committees, as the case may be, will decide in respect of each member of teaching staff on the merits of each case, whether to absorb him in Government service or whether to terminate his service or to allow him to continue on an ad hoc basis for a fixed term or on contract and shall, where necessary, re-determine the rank, pay, allowances and other conditions of service.

(4) The State Government shall similarly determine the term of appointment and other conditions of service of other categories of staff of the College on the basis of facts to be ascertained either by a Committee or by an officer entrusted with the task and the provisions of Sub-sections (2) and (3) shall apply mutatis mutandis to such cases.

It shows that the staff of the college has been divided into two sections viz (1) teaching staff and (2) other categories of staff, which for the sake of convenience may be called, non-teaching staff. It is the terms of their employment which is settled by Section 6. Sub-section (1) thereof only says that from the date of the notification of taking over "all the staff employed in the college shall cease to be the employees of the College body". In the transition period i.e. after taking over of the college under the Ordinance and before taking over of the college under the Act the management and ownership had vested in a body called "College body" which has also been defined in the Act itself. With effect from the date of the notification of taking over of the college under the Act, the staff ceases to be the employees of the College body. The Act is however, silent as to whose employee the staff becomes after taking over of the college. The staff may be employee of the State Government because the State Government has taken over the college, but the question remains to be thrashed is whether the service conditions of the staff change automatically or not. In considering this point it is the proviso to Sub-section (1) which plays an important part. The proviso says that the staff would continue to serve the college on ad hoc basis and that till a decision under Sub-sections (3) and (4) is taken by the State Government. It is amply clear from this that on the date of the taking over notification itself (Annexure 3A) it does not happen that all the members of the staff become Government servants. A period has been prescribed in which they will be on ad hoc basis, and it is after that that their real character will be determined. The State Government have certain options in this regard within the frame-work of

Sub-sections (2), (3) and (4) of Section 6 of the Act.

8. In order to carry out the requirement of proviso to Sub-section (1) a committee of experts and knowledgeable persons has to be appointed under Sub-section (2). In the instant case the committee appointed was called the Screening Committee. Before examining the provision I may mention that the report of the Screening Committee has been made available from the file of C.W.J.G. No. 3414 of 1980 (Annexure G therein) which runs as follows:

ANNEXURE-C

Extract of the Screening Committee Report Dated 14-3-1980 and 15-5-1980

Para-9. Regarding the reference made by the Health Department in respect of the Superannuated teachers the Committee's recommendations are as follows:

(a) All teachers beyond the age of 58 years may be retired subject to reappointment if there are no qualified substitutes. This should apply to all State Medical Colleges and the re-employment may be made up to maximum of 62 years of age.

(b) In no case service of teachers who have already attained the age of 62 years be retained.

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Thus the Screening Committee has recommended that all teachers beyond the age of 58 years may be retired. Scope for re-appointment is also there with which this writ application has nothing to do. In paragraph 10 of the counter-affidavit of respondents 1, 2 and 4 it has been specifically stated that on the recommendation of the Screening Committee the Government decided to retire "all such teaching staff of the erstwhile private medical colleges including the college in question who attained the age of 58 years and the said decision was communicated through principal of the respective colleges which has been annexed as Annexure 5". Thus there is no dispute on the point that the State Government have taken a decision to retire members of the staff at the age of 58 on recommendation of the Screening Committee. The point that arises for decision now is whether it was within the competence of the Screening Committee to make such a recommendation or in other words whether the Screening Committee could be called upon under Sub-section (2) of Section 6 to report regarding the age of superannuation.

Under Section 6(2) of the Act quoted at page 7 of the Committee has to examine the bio-data of each member of the teaching staff and has to ascertain only what has been mentioned in Sub-section (2). It cannot go on ascertaining or reporting on any matter which does not find place in Sub-section (2). The Screening Committee could ascertain only whether the appointment, promotion or confirmation of teacher was in accordance with the university regulations and the

guidelines laid down by the Medical Council of India. In so doing the Screening Committee could also take into consideration other relevant materials including the length of service in the college. After doing so i.e. after ascertaining whether the appointment, promotion or confirmation of a teacher was in order, it had to submit its report to the State Government. Thus the report about the condition of service, or for the matter of that, the age of retirement would be beyond the scope of Sub-section (2) and even if a report is called for and submitted it cannot have any value in the eye of law. It may be stated here that it was conceded at the time of argument by the learned Attorney General that appointment of the petitioner was regular and not in contravention of any regulation and the guidelines laid down by the Medical Council of India.

9. The function of the State Government on the receipt of the above report is laid down in Sub-section (3) and as I am going to show even Sub-section (3) does not envisage any report about the condition of service and age of retirement. Sub-section (3) quoted at page 5 empowers the State Government to decide in respect of each teacher whether to absorb him in the Government service, or, whether to terminate his service, or to allow him to continue on an ad hoc basis for a fixed term or on contract. The State Government have further powers under this sub-section to re-determine the rank, pay allowance and other conditions of service of such a teacher about whom report has been submitted under Sub-section (2). It is thus clear that on receipt of the report of the Screening Committee, the State Government have at least three, if not more, alternatives and they can choose any of them. But as has been shown, it is not within the competence of the Screening Committee to report the age of retirement and therefore the State Government's decision on such a report cannot be held to be valid in the eye of law. The last portion of Sub-section (3) which refer to other conditions of service only refer to those cases in which the Government may after examining the cases individually find it necessary to determine the rank, pay and allowances etc. of a particular teacher. It was not for the Screening Committee to lay down a general policy or principle regarding the age of all teachers because there could be no valid reference regarding it under Sub-section (2). In this view of the matter, the decision of the State Government on the report of the Screening Committee and covered by Annexure 3 to the writ petition cannot be sustained in the eye of law. I am supported in this view by an unreported Bench decision of this Court in C.W.J.C. No. 5004 of 1978 and C.W.J.C. No. 664 of 1978 the judgment of which has been enclosed as annexure 7 to the petition. That case also related to service conditions of some teachers of acquired medical colleges (SIC).

Editor's Notes. About half a typed page of judgment mostly reproduction from above referred C.W.J.C. not clear and readable hence not reproduced,

10. Before coming to Sub-section (4), I may here itself refer again to some of the alternatives the State Government have under Sub-section (3), in order to meet one of the arguments of the learned Attorney General. As I have shown

above, the main alternatives before the State Government are either to absorb a teacher to Government service or to terminate his service or to allow him to continue on ad hoc basis. So whether a teacher would be absorbed in Government service or not, has to depend upon the report of the Screening Committee. The learned Attorney General has argued that leaving aside Sub-sections (2), (3) and (4) of Section 6, on enacting part of Sub-section (1) itself it is clear that when the college was taken over, the staff became employees of the State Government. With all respects to him, I find myself unable to agree to this, particularly in view of the alternatives given to the State Government in Sub-section (3). If all members of the staff became Government servants on the day the college was taken over by notification, there could be no scope for the State Government to take a decision whether to absorb any teacher in the Government service or not on basis of the report of the Screening Committee, Hence it cannot be said that the day college was taken over all the staff of the college became Government servant.

11. Sub-section (4) of Section 6 deals with the non-teaching staff with which this writ application has little to do. The learned Counsel for the petitioner however relied upon it for drawing a distinction between the reference that can be made in respect of teaching and non-teaching staff. While Sub-section (4) permits reference about conditions of service of non-teaching staff, there is no such provision regarding teaching staff in Sub-section (2). It means that the legislature did not intend to refer to the Screening Committee the conditions of service of teachers. The argument has force in it, and it cannot be brushed aside. It would thus appear that the petitioner could not be retired on attaining the age of 58, under the cover of Section 6 of the Act.

12. On behalf of the respondents it has also been urged that if Section 3(1) and 6 are read together the conclusion is irresistible that all the employees including the petitioner will have to retire on attaining the age of 58. I have shown above how this is not the position u/s 6 of the Act. If I show that this is not the position u/s 3(1) of the Act also, then merely by reading both the provisions together, the conclusion cannot change. Section 3(1) quoted at page 5 under the first part of this sub-section the State Government takes over a college and under the second part management and control is exercised in the manner laid down in the notification. As would appear from the notification Annexure 3-A it has only been said that the management and control would be done in accordance with Section 4(a) of the Act. Section 4(a) has little to do with determination of the service conditions of the employees. Under the first part of Section 3(1) only by taking over the college it cannot be said that the service conditions of all the employees automatically change, particularly in view of special provisions made in Section 6 of the Act which have been discussed above. Here itself I may also refer to Rule 3(a) of the Bihar Service Code (hereinafter referred to as the Code) which runs as follows:

Nothing in these rules shall operate to deprive any person, of any right or

privilege to which he is entitled by or under any law. or by the terms of any contract or agreement subsisting between such person and the Government.

I have referred to the Code because the respondents claim to retire the petitioner on attaining the age of 58 under Rule 73 of this Code. But Rule 3(a) of the Code clearly says that if person has any right or privilege to which he is entitled under any law, he cannot be deprived of that by virtue of the rules contained in the Code. There is no dispute on the point that as per regulations and statutes of the University the petitioner would ordinarily have retired on attaining the age of 62. Thus his case is covered by Rule 3(a) of the Code. It is thus clear that by virtue of first part of Section 3(1) of the Act also the age of retirement of the petitioner is not affected. In this view of the matter, the argument of irresistible conclusion has also to be ruled out.

13. The argument that in absence of any specific rule fixing the age of superannuation of teachers of acquired colleges the general rule would apply, does not also seem to be well founded. The general rules are there in the Code but the case of the petitioner comes within the exception (Rule 3(a) of the Code) as shown above. Because the age of retirement in all the medical colleges is 58, the petitioner cannot be denied his privilege which he has in law, and no case of violation of Articles 14 and 16 can in my opinion be made out.

Where the right of a subject is sought to be encroached upon, great caution is required in interpreting the law. Reference may be made to *Mex-well on the Interpretation of Statutes* (12th edition pages 251-252), where it has been observed as follows:

Encroachment of rights.-Statutes which encroach on the rights of the subject, whether as regards person or property, are subject to a strict construction in the same way as penal Act. It is a recognised rule that they should be interpreted, if possible, so as to respect such rights, and if there is any ambiguity the construction which is in favour of the freedom of the individual should be adopted. One aspect of this approach to legislation is the presumption that a statute does not retrospectively abrogate vested rights; another is the presumption that proprietary rights are not taken away without provision being made for compensation.

"If there is any ambiguity about the extent of the derogation by a statute from common law rights the principle is clear that it is to be resolved in favour of maintaining common law rights unless they are clearly taken away." The well established presumption is that the legislature does not intend to limit vested rights further than clearly appears from the enactment."

14. Reference has been made by the learned Attorney General to Section 12 of the Act also which reads as follows I-

12. Overriding effect of the Act.-The provision of this Act shall have effect notwithstanding any thing inconsistent therewith contained in any other law for

the time being in force or any instrument having the effect of law.

This could have come to the rescue of the respondents only if the service conditions, particularly " the age of retirement, had been fixed by this Act. On the other hand as has been shown above, the case of the petitioner is saved by the provision of this very Act, and hence the respondents cannot get any support from it.

15. It was also argued by the learned Attorney General that under proviso to Section 6 of the Act since the taking over of the college, the petitioner is continuing only on ad hoc basis, which does not at all clothe him with any right and the very word ad hoc indicates that his service can be terminated at any moment. This is however not the position under the proviso in question. The proviso itself lays down that the staff would be on ad hoc basis till a decision under Sub-sections (3) and (4) is taken by the State Government, In the case of the petitioner no decision in the eye of law has yet been taken under Sections (3) and (4), as already discussed. Hence he has a right to continue, and if he has a right to continue, his service, cannot be terminated as suggested.

16. The argument of the learned Attorney General that if the petitioner denies to be the Government servant, he cannot claim relief against State and university is also not sound. Whether he is a Government servant or not, is not of importance. It is the State Government and the university which has passed order for retiring him *at a time when he has a legal right to continue, and therefore the petitioner's right to claim relief against them through a writ cannot be questioned. This has also been laid down by a Bench of five Judges in the case of The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others, , relied upon by the petitioner's counsel.

17. Reliance has been placed by the respondents on the case of Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others, , for a proposition that no mandamus can be issued in a case like this. The appellant was an erstwhile Manager of two firms under the Administration of Evacuee Property Act 1950, When the firms were taken over by the Deputy Custodian the appellant filed a writ for quashing his termination and for requiring the respondents to handover the firms to him and not to sell them. It was found that by virtue of Section 10(2)(b) of the 1950 Act *ibid* the appointment of appellant was contractual in its nature, and hence no writ could lie. That is not the position" here. No contractual right is sought to be enforced by the petitioner in this writ application. On facts therefore the authority has no application. The second case relied upon is of Mani Subrat Jain and Others Vs. State of Haryana and Others, , The names of appellants there were recommended by the High Court of Haryana for appointment as Additional District and Sessions Judges, but the Government did not appoint them and so they invoked the writ jurisdiction of the High Court. It was held that since they had no legal right, they could not seek mandamus. In the instant case the petitioner has been held to have legal right, as such the authority has no application. The last case relied upon is the

case of Radhakrishna Agarwal and Others Vs. State of Bihar and Others, . It is again an authority operating in contractual field and hence inapplicable to the instant case.

18. Mr. Singh for the petitioner has relied upon the case of N. Baksi Vs. Accountant General and Another, , M.D. Shukla and Others Vs. State of Gujarat and Others, , and Ex-Major N.C. Singhal Vs. Director General Armed Forces Medical Services, New Delhi and Another, , for the proposition that the legal right cannot be abrogated in the manner sought to be done, and his right to pray for writs cannot be denied. In view of the concession recorded in para 5 of this judgment, I need not discuss these authorities in detail. Suffice it to say that they lend support to the petitioner's case.

19. In view of my discussion aforesaid, it is clear that the petitioner cannot be compelled to retire on the ground that he has attained or crossed the age of 58. He will therefore retire on attaining the age of 62. Hence Annexures 5, 6 and 8 are hereby quashed and it is directed that the petitioner shall in ordinary course be allowed to continue on his present post till he attains the age of 62. Let appropriate writs issue. The application is thus allowed, In the circumstances of the case there will be no order as to costs.

S.K. Choudhuri, J.

20. I agree.